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Leong Wai Choong (suing in the capacity as an administrator for the estate of Leong Kuan Tan @ Leong Ah Koon, the deceased) & Ors v Mah Guat Eng & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-418–02 OF 2018
ZALEHA YUSOF, YAACOB MD SAM AND LAU BEE LAN JJCA
10 JULY 2020

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Land Law — Sale of land — Order for — Termination of co-proprietorship through sale of land — Whether res judicata applied — Whether by virtue of agreement respondents could not be compelled to sell property — National Land Code s 89

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This was an appeal against the decision of the High Court in dismissing the appellants' originating summon ('OS') which sought for, inter alia, a declaration that the parties' co-proprietorship be terminated and the property be sold at the market value and the proceeds be divided according to the shares held under the title by the appellants and the respondents. The property was originally registered under the name of the late Thong Ah Chan as a sole proprietor. However, before her passing, the late Thong Ah Chan had transferred her undivided share in the property to her four sons, Leong Kuen Hong @ Leong Kuen Ho ('LKH'), Leong Kuan Tan@ Leong Ah Koon ('LKT'), Leong Keng Fook ('LKF') and Leong Kuen Wai ('LKW'). The four siblings had decided to construct a four-storey building and later they entered into an agreement ('the 1980 agreement') in which they acknowledged that they were the registered proprietors of the property and that each of them shall be the registered owner of the building as follows (a) LKH — ground and mezzanine floor; (b) LKW — first floor; (c) LKF — second floor, and (d) LKT — third floor. Except for LKW, who was the third appellant in this appeal, LKH, LKF and LKT had since passed on. Following their demise, the appellants became the current co-proprietors of the property, with the appellants holding 75% and the respondents holding 25% of the undivided share in the property. The first appellant was the administrator of the estate of LKT and the second appellant was the executor of the estate of LKF. While the first respondent was the widow and executor of the estate of LKH and the second respondent was their child. In 2006 the appellants had sued the respondents via Kuala Lumpur High Court Suit No S4–22–1131 of 2006 ('the 2006 Suit') seeking payment of the 3/4 rental collections. The 2006 Suit was dismissed by the High Court and on appeal to the Court of Appeal, the Court of Appeal had also dismissed the appellants' appeal. The appellants had

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proposed to the respondents to sell the property or alternatively the respondents to purchase the appellants' share of the property at a price to be mutually agreed by the parties. As there was no response from the respondents, the appellants filed the OS. The High Court had dismissed the OS, hence this appeal. The issues for consideration were: (a) whether res judicata applied; and (b) whether by virtue of the 1980 agreement, the respondents could not be compelled to sell the property.

Held, allowing the appeal and order in terms of originating summons granted:

(1) The 2006 Suit was in respect of rental income derived from the building. Whereas the OS sought to terminate the co-proprietorship between the parties. Claim for payment of rental income and claim for termination of co-proprietorship between the parties were obviously two different matters. The decision in 2006 Suit thus had nothing to do with termination of co-proprietorship of the property. Hence, res judicata did not apply (see paras 12–13).

(2) It is our considered view, that does not mean that contractual obligations can override s 89 of the National Land Code that the register document of title was conclusive evidence of proprietorship. The learned High Court judge's finding that the respondents acquired an 'indefeasible right' to the ground and mezzanine floors of the property from the 1980 agreement contradicted the register document of title wherein the appellants and the respondents were registered as co-proprietors holding undivided share in the property and not designated floors of the property. 'Ownership' in the 1980 agreement was on the floors of the building not on the proprietorship of the property ie the land. By virtue of the holding of the property in undivided share, the parties were entitled to share the said property as a whole and not the designated floors. The learned High Court judge had erred when she held that the respondents could not be compelled to sell the property by virtue of the 1980 agreement. The 1980 agreement was merely a contractual arrangement entered between LKT, LKF, LKH and LKW to regulate outgoings and income derived from the property (see paras 16, 18 & 20–21).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi dalam menolak saman pemula ('SP') perayu yang memohon, antara lain, pengisytiharan bahawa milikan bersama pihak-pihak ditamatkan dan hartanah itu dijual dengan nilai pasaran dan hasil dibahagikan mengikut bahagian yang dipegang oleh perayu-perayu dan responden-responden. Hartanah ini pada mulanya didaftarkan dengan nama mendiang Thong Ah Chan sebagai pemilik tunggal. Namun, sebelum kematiannya, mendiang Thong Ah Chan telah memindahkan bahagian tidak dibahagi hartanah kepada empat orang anak lelakinya, Leong Kuen Hong @ Leong Kuen Ho ('LKH'), Leong Kuan Tan @

Leong Ah Koon ('LKT'), Leong Keng Fook ('LKF') dan Leong Kuen Wai ('LKW'). Keempat adik-beradik itu telah memutuskan untuk membina satu bangunan dengan empat tingkat dan kemudian mereka membuat perjanjian ('perjanjian 1980') di mana mereka mengakui bahawa mereka adalah pemilik berdaftar hartanah dan bahawa masing-masing akan menjadi pemilik berdaftar bangunan seperti berikut (a) LKH — tingkat bawah dan mezanin; (b) LKW — tingkat pertama; (c) LKF — tingkat kedua, dan (d) LKT — tingkat ketiga. Kecuali LKW, yang merupakan perayu ketiga dalam rayuan ini, LKH, LKF dan LKT telah meninggal dunia. Setelah kematian mereka, perayu menjadi pemilik bersama hartanah sekarang, dengan perayu memegang 75% dan responden memegang 25% bahagian tidak dibahagi dalam hartanah. Perayu pertama adalah pentadbir harta pusaka LKT dan perayu kedua adalah pelaksana harta pusaka LKF. Manakala responden pertama adalah balu dan pelaksana harta pusaka LKH dan responden kedua adalah anak mereka. Pada tahun 2006, perayu telah menyaman responden melalui Guaman Mahkamah Tinggi Kuala Lumpur No S4–22–1131 Tahun 2006 ('guaman 2006') untuk meminta pembayaran 3/4 pungutan sewa. Guaman 2006 ditolak oleh Mahkamah Tinggi dan setelah merayu ke Mahkamah Rayuan, Mahkamah Rayuan juga telah menolak rayuan perayu. Perayu telah mencadangkan kepada responden untuk menjual hartanah atau sebagai alternatif responden untuk membeli bahagian perayu dari hartanah itu dengan harga yang harus dipersetujui bersama oleh pihak-pihak. Oleh kerana tiada respon dari responden, perayu memfailkan SP. Mahkamah Tinggi telah menolak SP, oleh itu rayuan ini. Isu-isu untuk pertimbangan adalah: (a) sama ada res judicata terpakai; dan (b) sama ada berdasarkan perjanjian tahun 1980, responden tidak boleh dipaksa untuk menjual hartanah tersebut.

Diputuskan, rayuan dibenarkan dan perintah seperti dipohon dalam saman pemula dibenarkan:

(1) Guaman 2006 berkenaan dengan pendapatan sewa yang berasal dari bangunan. Manakala OS memohon untuk menamatkan hak milik bersama antara pihak-pihak. Tuntutan pembayaran pendapatan sewa dan tuntutan penamatan hak milik bersama antara kedua pihak jelas merupakan dua perkara yang berbeza. Oleh itu, keputusan dalam guaman 2006 adalah tidak ada kaitan dengan penamatan hak milik bersama hartanah. Oleh itu, res judicata tidak terpakai (lihat perenggan 12–13).

(2) Kewajiban kontrak tidak dapat mengatasi s 89 Kanun Tanah Negara bahawa dokumen hak milik adalah bukti muktamad milikan. Penemuan hakim Mahkamah Tinggi yang bijaksana bahawa responden memperoleh 'hak tidak boleh disangkal' pada tingkat bawah dan mezanin hartanah dari perjanjian 1980 bertentangan dengan dokumen hakmilik berdaftar di mana perayu dan responden didaftarkan sebagai pemilik bersama yang memegang bahagian tidak dibahagi dalam

hartanah dan bukan tingkat tertentu hartanah. 'Milikan' dalam perjanjian 1980 adalah di tingkat bangunan dan bukan milikan hartanah iaitu tanah. Dengan adanya pemilikan hartanah tersebut dalam bahagian tidak dibahagi, pihak-pihak berhak untuk berkongsi hartanah tersebut secara keseluruhan dan bukan lantai yang ditentukan. Hakim Mahkamah Tinggi yang bijaksana terkhilaf ketika beliau berpendapat bahawa responden tidak boleh dipaksa untuk menjual hartanah tersebut berdasarkan perjanjian 1980. Perjanjian 1980 hanyalah perjanjian kontrak yang dibuat antara LKT, LKF, LKH dan LKW untuk mengatur pengeluaran dan pendapatan yang berasal daripada hartanah (lihat perenggan 16, 18 & 20–21).]

Cases referred to

Lee A Hong @ Lee Lum Sow v Ishak bin Ismail & Anor [2018] MLJU 99, HC (refd)

Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals [2008] 5 MLJ 128; [2008] 3 CLJ 692, CA (refd)

Yong Hin Seong & Anor v Yong Teik Seong [2003] 6 MLJ 38, HC (refd)

Legislation referred to

National Land Code ss 89, 206, 206(3)

Appeal from: Originating Summons No WA-24NCVC-848–05 of 2017

(Mah Weng Kwai & Assoc) for the appellants.
(Goik, Ramesh & Loo) for the respondents.

Zaleha Yusof JCA:

[1] This is an appeal against the decision of the High Court at Kuala Lumpur, in dismissing the appellants' originating summon ('OS') which sought for, inter-alia, a declaration that the parties' co-proprietorship be terminated and the property be sold at the market value and the proceeds be divided according to the shares held under the title by the appellants and the respondents.

[2] The proprietorship is in respect of a property held under the individual title of GRN 78294, Lot 832 Section 62 (formerly known as HS(D) 86349, PT No 49, Section 62), in the Town and District of Kuala Lumpur, State of Wilayah Persekutuan bearing an address at No 1, Lorong Brunei 2, Pudu, 55100 Wilayah Persekutuan Kuala Lumpur ('the property').

[3] The property was originally registered under the name of the late Thong Ah Chan as a sole proprietor. However, before her passing, the late Thong Ah

Chan had transferred her undivided share in the property to her four sons, Leong Kuen Hong @ Leong Kuen Ho ('LKH'), Leong Kuan Tan@ Leong Ah Koon ('LKT'), Leong Keng Fook ('LKF') and Leong Kuen Wai ('LKW').

[4] The four siblings had in 1977 decided to construct a four storey building with a mezzanine floor on the property. Later, on 10 June 1980, they entered into an agreement ('the 1980 agreement') in which they acknowledged that they were the registered proprietors of the property and that each of them shall be the registered owner of the building as follows:

(a) LKH — ground and mezzanine floor;

(b) LKW — first floor;

(c) LKF — second floor; and

(d) LKT — third floor.

[5] The 1980 agreement also provides that all of them agreed to pay whatever monies due to the government in terms of quit rent, assessment and other out going in respect of the said building 'according to their value of shares'.

[6] Except for LKW, who is the third appellant in this appeal, LKH, LKF and LKT had since passed on. Following their demise, the appellants became the current co-proprietors of the property, with the appellants holding 75% and the respondents holding 25% of the undivided share in the property. The first appellant is the administrator of the estate of LKT and the second appellant is the executor of the estate of LKF. While the first respondent is the widow and executor of the estate of LKH and the second respondent is their child.

[7] Prior to the filing of the OS, the appellants had proposed to the respondents to sell the property or alternatively the respondents to purchase the appellants' share of the property at a price to be mutually agreed by the parties; by way of letters dated 25 May 2016 and 30 June 2016. As there was no response from the respondents, the appellants filed the OS.

[8] As alluded to earlier, the High Court had dismissed the OS, hence the appeal before us. This court, upon hearing of the appeal had, by a majority decision, allowed the appeal. This grounds of judgment reflect the majority decision. In this grounds of judgment we shall explain why we allowed the appeal.

ISSUES

(a) whether res judicata applies; and

(b) whether by virtue of the 1980 agreement, the respondents cannot be compelled to sell the property.

DECISIONS

Whether res judicata applies

[9] This issue arose as in 2006 the appellants had sued the respondents via Kuala Lumpur High Court Suit No S4–22–1131 of 2006 ('2006 Suit') seeking payment of the 3/4 rental collections in respect of the ground and the mezzanine floors of the building received by the respondents. The prayers sought by the appellants were reiterated in the appellants' written submissions as follows:

> 14 Maka, plaintiff-plaintiff memohon daripada mahkamah yang mulia ini terhadap defendan-defendan untuk perintah dan penghakiman seperti berikut:
>
> (a) satu deklarasi bahawa plaintif-plaintif sebagai pemilik berdaftar hartanah yang dikenali sebagai No HS(D): 86349, No Lot 49, Seksyen 62, Bandar Kuala Lumpur, Daerah Kuala Lumpur dan Negeri Wilayah Persekutuan, Kuala Lumpur yang beralamat pos di No 1, Lorong Brunei, 55100 Pudu Kuala Lumpur berhak mendapatkan segala maklumat dan dokumen mengenai semua transaksi penyewaan hartanah tersebut daripada defendan pertama dan defendan kedua;
>
> (b) satu injunksi bahawa defendan ketiga dan defendan keempat iaitu penyewa-penyewa hartanah yang tersebut di atas, dihalang daripada membayar sewa bulanan secara terus kepada defendan pertama dan/atau defendan kedua dan satu injunksi untuk menyekat defendan pertama dan/atau defendan kedua daripada mengutip sewa bulanan daripada defendan ketiga dan defendan keempat;
>
> (c) bahawa mulai tarikh writ saman ini, keseluruhan jumlah sewa setiap bulan yang akan dibayar oleh defendan ketiga dan defendan keempat kepada peguam plaintif-plaintif sebagai pemegang taruh (stakeholder) sehingga penyelesaian tuntutan ini;
>
> (d) bahawa defendan pertama dan defendan kedua membayar kepada plaintif pertama, plaintif kedua dan plaintif ketiga mengikut hak bahagian masing-masing jumlah RM540,000 iaitu ¾ daripada keseluruhan sewa yang dikutip dari Januari 2000 sehingga September 2006 bersama dengan faedah pada kadar 8% setahun ke atas jumlah RM540,000 tersebut yang dikira dari tarikh sewa dibayar oleh defendan ketiga dan defendan keempat kepada defendan pertama dan defendan kedua sehingga tarikh penyelesaian sepenuhnya;

(e) defendan pertama dan defendan kedua membayar plaintif-plaintif kos tindakan ini;

(f) plaintif-plaintif adalah bebas untuk memohon arahan lanjut; dan

(g) lain-lain perintah atau arahan yang mahkamah yang mulia ini anggap sesuai dan berpatutan.

[10] The 2006 Suit was dismissed by the High Court and on appeal to the Court of Appeal, the Court of Appeal had also dismissed the appellants' appeal.

[11] The learned High Court judge in her grounds of judgment of the OS had, inter alia, stated as follows:

> 6.5 The issue on the validity and enforceability of the 1980 Agreement to parties (sic) dispute on their respective ownership of the building was fully resolved and determined by the judicial pronouncements of the High Court and the Court of Appeal respectively dated 31 July 2009 and 11 October 2011.
>
> ...
>
> 6.11 Thus, plaintiffs present suit was found by the court to be made mala fide and, constitute a blatant disregard and, disrespect for the law. By filing this present action, the plaintiffs have disregarded the earlier judicial pronouncements and, attempted to re-litigate settled issue previously canvassed, deliberated and fully, (sic) judicially determined. Plaintiffs' (sic) present action is undoubtedly an abuse of the court process and, res judicata given the involvement of similar parties, issues, (sic) reliefs and, causes of action and factual background.

[12] With due respect to the learned High Court judge, the 2006 Suit was, as shown in the prayers as cited above, in respect of rental income derived from the building. Whereas the OS sought to terminate the co-proprietorship between the parties. Claim for payment of rental income and claim for termination of co-proprietorship between the parties are obviously two different matters. This court in the 2006 Suit, as shown at p 232 of the record of appeal had clearly ruled against the appellants on the ground that 'there was an agreement as regards the collection and appropriation of rental by the respondent'. Hence the respondents were allowed to retain the rental income. The decision of this court in 2006 Suit thus had nothing to do with termination of co-proprietorship of the property.

[13] Hence, we agree with learned counsel for the appellants that res judicata does not apply.

Whether by virtue of the 1980 agreement, the respondents cannot be compelled to sell the property

[14] On this issue, the learned High Court judge had in her grounds of

judgment, stated the following:

> 6.1.2 Plaintiffs (sic) present action attempted to terminate the co-proprietorship of the property which clearly was to apportion the sale proceeds to the detriment of defendants rightful ownership entitlement for the entire ground and mezzanine floors. Plaintiffs' actions undisputedly was plaintiffs' second bite of the cherry given plaintiffs' hitherto failed attempt in their 2006 Suit for the retention of rental proceeds.
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> ...
>
> 7.1 Based on the above grounds, the court is in agreement with the defendants that, in pursuant of s 206 of the NLC, defendants should not be deprive of it's indefeasible right over the ground and mezzanine floors of the subject property as was intended and, agreed by the original co-proprietorship of the property in the 1980 agreement.
>
> 7.2 The defendants accordingly should not be compelled by a court order, to sell a property against their will particularly as the underlying motive for the plaintiff's originating summons was, the apportionment of sale proceeds that exceeded and contradicted the express intent of the contracting parties in their 1980 agreement.

[15] Section 206 of the National Land Code provides as follows :

> 206 Need for proper instrument of dealing, duly registered
>
> (1) Subject to the following provisions of this section:
>
> (a) every dealing under this Act shall be effected by an instrument complying with the requirements of ss 207 to 212; and
>
> (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Part Eighteen
>
> (2) ...
>
> (3) Nothing in subsection (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

[16] It was the respondents' submission that based on this court's decision in *Rabiah bt Lip & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2008] 5 MLJ 128; [2008] 3 CLJ 692, the object of s 206(3) is to preserve contractual obligations. We have no quarrel with this. However, it is our considered view, that does not mean that contractual obligations can override s 89 of the National Land Code that the register document of title is conclusive evidence of proprietorship.

[17] Even the appellants in *Rabiah Lip* who used s 206(3) to claim they had acquired an equitable interest over the land, failed, as this court found that they failed to establish that the transfer to the respondent was fraudulent. Still on

sub-s 206(3), we endorse learned counsel for the appellants' written submissions as follows:

> 52 The application of s 206(3) of the NLC 1965 was explained in the LexisNexis Annotated Statutes of Malaysia as follows:
>
> (a) a contract, not perfected by registration in accordance with the terms of the National Land Code can result in an in *personam* remedy which is enforced by monetary compensation;
>
> (b) this type of contract has *no effect* on interest registered in the Land Registry; and
>
> (c) it has only been inserted into the National Land Code to confirm that the approach of earlier legislation which denied contractual operation to an unregistered transaction was not the approach of the National Land Code.
>
> 53 The scope of s 206(3) of the NLC 1965 was discussed in depth by the learned author, SY Kok in his book *The Torrens System and Equitable Principles* as follows:
>
> (a) the legislative intent on the effect on the provision in s 206(1) of the NLC 1965 is to prohibit any attempt to use an unregistered instrument to effect a transfer of an existing registered title or encumbrance, without complying with the statutory requirements to present an executed and registrable instrument to the State's registering authority for registration;
>
> (b) on the other hand, s 206(3) of the NLC 1965 is a statutory preservation of the pre-registration contractual nature of an unregistered but yet executed and *registrable instrument* of dealing in Torrens system land; and
>
> (c) however, s 206(3) does not act as a floodgate for the judiciary to unlock and, consequently, to flood the Torrens system with all sorts of unwanted and unwarranted equitable principles, which will positively undermine the conclusive Torrens register.

[18] From the register document of title and the issue document of title it is clear that none of the parties had ever applied to subdivide the property. The property as it is remains as undivided shares and the parties hold them as co-proprietors. We therefore agreed with learned counsel for the appellants that the learned High Court judge's finding that the respondents acquired an 'indefeasible right' to the ground and mezzanine floors of the property from the 1980 agreement contradicts the register document of title wherein the appellants and the respondents are registered as co-proprietors holding undivided share in the property and not designated floors of the property. 'Ownership' in the 1980 agreement is on the floors of the building *not* on the proprietorship of the property ie the land. And of course under the National Land Code, the land will include the building.

[19] Judith Sihombing in her book *National Land Code A Commentary*, at p 837 had explained the meaning of the holding of alienated land in undivided shares as follows:

A The holding of alienated land in 'individual shares' means that the co-owner owns a share in the land of a particular quantum but that this share has not been cut off from the shares of his other co-owners. All the co-owners are entitled to share in the possession of the land and any profits associated with the use of the land, but at no time may an individual co-owner point to particular part of the land and identify
B that part as his.

[20] Hence we were of the view that by virtue of the holding of the property in undivided share, the parties ie the appellants as well as the respondents are entitled to share the said property as a whole and not the designated floors as
C found by the learned High Court judge.

[21] Based on the above, we were of the view that the learned High Court judge had erred when she held that the respondents cannot be compelled to sell
D the property by virtue of the 1980 agreement. We agreed with the appellants that the 1980 agreement was merely a contractual arrangement entered between LKT, LKF, LKH and LKW to regulate outgoings and income derived from the property.

E CONCLUSION

[22] Three out of four of the original co-proprietors had passed away. The present co-proprietors, the appellants and the respondents, according to learned counsel for the appellants are not on talking terms. We found the best
F way to end the deadlock between them is by terminating the co-proprietorship in the property. See *Lee A Hong @ Lee Lum Sow v Ishak bin Ismail & Anor* [2018] MLJU 99 and *Yong Hin Seong & Anor v Yong Teik Seong* [2003] 6 MLJ 38.

G **[23]** We agreed with learned counsel for the appellants that appellate intervention is warranted herein as the learned High Court judge had erred in both law and fact when she disregarded the clear legislative intent in s 89 of the National Land Code that information in the land registry shall be conclusive
H evidence of proprietorship under the Torrens system. Her Ladyship was also wrong to hold that res judicata applied in this case.

[24] We therefore, by majority allowed this appeal with costs and the order of the High Court dated 25 January 2018 was therefore set aside. We granted
I order in terms of the OS dated 29 May 2017.

Appeal allowed and order in terms of originating summons granted.

Reported by Ahmad Ismail Illman Mohd Razali